

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>JUDY PELLETIER,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 97-364-P-H</i></b>
	)	
<b>KENNETH S. APFEL,</b>	)	
<b><i>Commissioner of Social Security,</i></b>	)	
	)	
<b><i>Defendant</i></b>	)	

**RECOMMENDED DECISION ON PLAINTIFF'S APPLICATION  
FOR FEES AND EXPENSES**

The plaintiff, Judy Pelletier, has applied for an award of attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, in this appeal from a denial of benefits by the Social Security Administration. This court remanded the matter to the defendant with directions to award benefits to the plaintiff. Docket No. 9. The defendant does not contest the plaintiff's entitlement to such an award. He disputes only the hourly rate at which the plaintiff's counsel seeks payment. The only issue before the court is the reasonableness of the fee request under the Act. It is the plaintiff's burden to establish that the amounts requested are reasonable. *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804, 827 (D. Me. 1992).

The plaintiff seeks to recover attorney fees at an hourly rate of \$130 for 31.7 hours and \$150 in expenses, the filing fee for this action. The filing fee is clearly recoverable. *Id.* at 827 n.65; *Willoughby v. Chater*, 930 F. Supp. 1466, 1470 (D. Utah 1996).

The Act sets an hourly rate for awards of attorney fees.

The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). The ceiling was raised from \$75 per hour to \$125 per hour in 1996. Pub. L. No. 104-121, § 232 (1996). The plaintiff argues that reimbursement at an hourly rate of \$130 in this case is justified inasmuch as an additional \$5 per hour is consistent with increases in the Consumer Price Index since March 29, 1996, as demonstrated by data for the New England area from the Bureau of Labor Statistics attached to the affidavit of her counsel. Docket No. 11. The defendant responds that the plaintiff has failed to establish her entitlement to reimbursement at a rate in excess of the statutory cap and seeks reimbursement at an unspecified hourly rate below the cap. He relies on *Chynoweth v. Sullivan*, 920 F.2d 648 (10th Cir. 1990), in which the Tenth Circuit held that “the statutory cap may be exceeded only in the unusual situation where the legal services rendered require specialized training and expertise unattainable by a competent attorney through a diligent study of the governing legal principles.” *Id.* at 650 (internal quotation marks omitted). However, that holding was directed only toward a request for an increase in the statutory cap beyond an increase already granted for cost-of-living increases. *Id.* at 649.

The total difference in dispute here is at least \$158.50 (31.7 hours x \$5) and at most an unknown amount, since the defendant does not suggest an appropriate hourly rate. I conclude that payment at the statutory maximum is justified, but not at a higher rate. The statutory maximum is

just that, a maximum, not a base rate.<sup>1</sup> There is nothing inherent in the issues presented in this case nor in the geographic area in which the plaintiff's counsel practices to justify exceeding the statutory maximum in this case.

Accordingly, I recommend that the plaintiff's application for an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, be **GRANTED** in the amount of \$4,112.50.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 22nd day of October, 1998.*

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*David M. Cohen*  
*United States Magistrate Judge*

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<sup>1</sup> This court has allowed an increase in the hourly rate above the statutory cap when the regional consumer price index had increased approximately 68% since the then-statutory \$75 hourly cap had been enacted, but even then the court allowed an increase in the hourly rate of only 33%. *Kimball v. Shalala*, 826 F. Supp. 573, 576 (D. Me. 1993). Inasmuch as there has been only a 4% increase in the regional consumer price index since the statutory maximum was last adjusted, it does not seem to me to be consistent with the statutory maximum approach to authorize an hourly fee which exceeds that cap under the circumstances.